

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 ALCIDES RODRÍGUEZ-DURÁN,

4 Petitioner,

5 v.

6 UNITED STATES OF AMERICA,

7 Respondent.

Civil No. 08-2297 (JAF)

(Crim. No. 05-309)

8 **OPINION AND ORDER**

9 Petitioner, Alcides Rodríguez-Durán, brings this pro-se petition
10 for relief from a federal court conviction pursuant to 28 U.S.C.
11 § 2255. (Docket No. 1.) Respondent, the United States of America,
12 opposes (Docket No. 3), and Petitioner replies (Docket No. 5).

13 **I.**

14 **Factual and Procedural History**

15 On September 14, 2005, a federal grand jury indicted Petitioner
16 and nine other individuals on charges of (1) conspiracy to possess
17 cocaine with intent to distribute on board a vessel subject to the
18 jurisdiction of the United States; (2) knowingly aiding and abetting
19 each other in possessing cocaine with intent to distribute; and (3) a
20 forfeiture of proceeds derived from the above violations. (Case
21 No. 05-309, Docket No. 23.) These charges stemmed from an inspection
22 by the United States Coast Guard on August 25, 2005, of the Bolivian
23 vessel Sea Atlantic, which Petitioner captained. United States v.
24 Rodríguez-Durán, 507 F.3d 749, 754-57 (1st Cir. 2007). While
25 patrolling the South American coast, the Coast Guard received notice
26 that the Sea Atlantic was rendezvousing with a small boat. Id. at

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1 754. This suspicious action prompted the Coast Guard to approach the
2 vessel and, after receiving the necessary permission from the
3 Bolivian government, inspect it. They found a large quantity of
4 cocaine in a secret compartment in one of the berthing rooms. Id. at
5 755. On October 24, 2005, Petitioner was found guilty of all three
6 counts after a five-day jury trial. (Case No. 05-309, Docket
7 No. 133.)

8 We held a sentencing hearing on January 30, 2006. (Case No. 05-
9 309, Docket No. 202.) We sentenced Petitioner to 292 months in
10 prison, five years of supervised release, and a special monetary
11 assessment of two hundred dollars. (Case No. 05-309, Docket No. 203.)
12 Petitioner appealed and, on November 21, 2007, the First Circuit
13 affirmed his sentence. Rodríguez-Durán, 507 F.3d 749.

14 Petitioner moved for § 2255 relief on November 13, 2008.
15 (Docket No. 1.) Respondent opposed on January 16, 2009 (Docket
16 No. 3), and Petitioner replied on February 17, 2009 (Docket No. 5).

17 II.

18 Standard for Relief Under 28 U.S.C. § 2255

19 A federal district court has jurisdiction to entertain a § 2255
20 petition when the petitioner is in custody under the sentence of a
21 federal court. See 28 U.S.C. § 2255. A federal prisoner may challenge
22 his or her sentence on the grounds that, inter alia, it "was imposed
23 in violation of the Constitution or laws of the United States
24" Id. The petitioner is entitled to an evidentiary hearing
25 unless the "allegations, accepted as true, would not entitle the
26 petitioner to relief, or . . . 'are contradicted by the record,
27 inherently incredible, or conclusions rather than statements of

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fact.'" United States v. Rodríguez Rodríguez, 929 F.2d 747, 749-50 (1st Cir. 1991) (quoting Dziurgot v. Luther, 897 F.2d 1222, 1225 (1st Cir. 1990)); see 28 U.S.C. § 2255(b).

III.

Analysis

Because Petitioner is pro se, we construe his pleadings more favorably than we would those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, Petitioner's pro-se status does not excuse him from complying with procedural and substantive law. Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997).

Petitioner asserts that his sentence was unconstitutional because (1) the vessel he was sailing was not subject to United States jurisdiction and he is consequently actually and factually innocent of committing a federal drug offense; (2) the jurisdictional section of the statute under which he was convicted, the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. § 70504(a),¹ is invalid because Congress lacks the power to remove all jurisdictional issues from the jury; and (3) his attorney was ineffective. (Docket No. 1.)

A. Lack of Jurisdiction

Petitioner claims that the vessel was not subject to United States jurisdiction and that Respondent failed to establish subject-matter jurisdiction. (Docket No. 1.) He further asserts that he is actually and factually innocent of committing a federal drug offense.

¹Congress amended the MDLEA in 1996 and made jurisdiction over vessels a preliminary question of law. United States v. Vilches-Navarrete, 523 F.3d 1, 9 n.5 (1st Cir. 2008). In the record, parties refer to 46 U.S.C. § 1903(f). This statute was in all material respects recodified in October 2006 at 46 U.S.C. § 70504.

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1 (Id.) Respondent counters, inter alia, that the issue was already
2 raised on appeal by a co-defendant and that Petitioner failed to make
3 a showing of actual innocence. (Docket No. 3.)

4 The decision of legal issues by an appellate court establishes
5 the "law of the case" in a subsequent appeal by a co-defendant.
6 United States v. Paquette, 201 F.3d 40, 42-43 (1st Cir. 2000) (citing
7 United States v. Rosen, 929 F.2d 839, 842 n.5 (1st Cir. 1991); United
8 States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999)). This is true
9 "unless the evidence on a subsequent trial was substantially
10 different, controlling authority has since made a contrary decision
11 of the law applicable to such issues, or the decision was clearly
12 erroneous and would work a manifest injustice." Rosen, 929 F.2d at
13 842 n.5 (citing White v. Murtha, 377 F.2d 428, 431-32 (5th Cir.
14 1967)). Accordingly, issues in a 28 U.S.C. § 2255 motion that have
15 been resolved by a prior appeal will not be reviewed again. Murchu v.
16 United States, 926 F.2d 50, 55 (1st Cir. 1991) (quoting Dirring v.
17 United States, 370 F.2d 862, 864 (1st Cir. 1967)).

18 In Petitioner's consolidated direct appeal, co-defendant Ronald
19 José Morelis-Escalona argued that his conviction was flawed because
20 the government failed to prove that the vessel was subject to United
21 States jurisdiction. Rodríguez-Durán, 507 F.3d at 761-62. The First
22 Circuit found that the flag nation's consent to jurisdiction was
23 sufficient and that the MDLEA does not require as a jurisdictional
24 prerequisite that the defendant's actions have affected the United
25 States. Id. (citing United States v. Bravo, 489 F.3d 1, 7 (1st Cir.
26 2007); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999)).
27 It also held that the Coast Guard had properly obtained consent from

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1 the Bolivian government to board and search the vessel and that the
2 evidence was sufficient to dismiss Morelis' jurisdictional challenge.
3 Id. at 757 n.9, 762.

4 Petitioner was a party to Morelis' appeal and his claims are
5 based on the same evidence. See id. at 749. There have been no
6 relevant changes in the law since the appeal and the decision in
7 Rodríguez-Durán does not seem erroneous or unjust. Therefore, we
8 dismiss Petitioner's jurisdictional claim. See Rosen, 929 F.2d at 842
9 n.5. As Petitioner's allegation that he was actually and factually
10 innocent was premised on lack of jurisdiction (Docket No. 1), we
11 likewise dismiss this claim.

12 **B. Removal of Jurisdictional Issue From the Jury**

13 Petitioner claims that 46 U.S.C. § 70504(a) is invalid because
14 Congress does not have the power to remove all jurisdictional issues
15 from the jury and that he was consequently denied his rights under
16 the Sixth Amendment. (Docket No. 1.) Respondent argues that the
17 jurisdictional determination is not an element of the offense under
18 the statute. (Docket No. 3.)

19 Under the MDLEA, jurisdictional issues are "preliminary
20 questions of law to be determined solely by the trial judge." 46
21 U.S.C. § 70504(a). The jurisdictional issue is not an element of the
22 offense. See Vilches-Navarrete, 523 F.3d at 12 (citing United States
23 v. Guerrero, 114 F.3d 332, 340 n.9 (1st Cir. 1997)). The First
24 Circuit has suggested that giving judges the power to determine
25 jurisdictional issues is constitutional. See id. at 19-23 (Lynch, J.
26 and Howard, J., concurring); accord United States v. Tinoco, 304 F.3d
27 1088, 1111-12 (11th Cir. 2002). But see, e.g., United States v.

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1 Perlaza, 439 F.3d 1149, 1167 (9th Cir. 2006). Therefore, we dismiss
2 Petitioner's claim that 46 U.S.C. § 70504(a) is unconstitutional.

3 **C. Ineffective Assistance of Counsel**

4 Petitioner asserts that his trial attorney was ineffective
5 because he failed to (1) conduct pretrial and trial investigation,
6 interview the government's witnesses prior to trial, or file more
7 than five motions; (2) bring on appeal the issues Petitioner now
8 raises regarding the lack of jurisdiction and the unconstitutionality
9 of 46 U.S.C. § 70504(a); and (3) file a motion to suppress the drugs
10 seized. (Docket No. 1.) Respondent counters that Petitioner failed to
11 establish prejudice and his claims are without merit because
12 Petitioner did not support his allegations and counsel has wide
13 latitude to make decisions regarding a case. (Docket No. 3.)

14 To establish ineffective assistance of counsel, a petitioner
15 must show both that his counsel's performance was deficient and that
16 he suffered prejudice as a result of the deficiency. Strickland v.
17 Washington, 466 U.S. 668, 686-96 (1984). To show deficient
18 performance, a petitioner must "establish that counsel was not acting
19 within the broad norms of professional competence." Owens v. United
20 States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.
21 at 687-91). To show prejudice, a petitioner must demonstrate that
22 "there is a reasonable probability that, but for counsel's
23 unprofessional error, the result of the proceedings would have been
24 different." Strickland, 466 U.S. at 694. However, a presumption of
25 prejudice is appropriate when "counsel was either totally absent or
26 prevented from assisting the accused during a critical stage of the
27 proceeding" or when counsel failed to test the prosecutor's case.

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1 United States v. Cronin, 466 U.S. 648, 659 & n.25 (1984); see also
2 Bell v. Cone, 535 U.S. 685, 697 (2002) (finding that for a court to
3 “presum[e] prejudice based on an attorney’s failure to test the
4 prosecutor’s case, . . . the attorney’s failure must be complete”).
5 Counsel’s failure is deemed incomplete if he cross-examined
6 witnesses, put on a defense, made objections, and presented a closing
7 argument. See United States v. Theodore, 468 F.3d 52, 57 (1st Cir.
8 2006) (citation omitted); Millender v. Adams, 376 F.3d 520, 524 (6th
9 Cir. 2004).

10 An attorney has a duty to conduct a reasonable investigation in
11 order to advise and represent his client. See Strickland, 466 U.S. at
12 691. In assessing the reasonableness of the investigation, a court
13 has to consider the amount of evidence already known to the attorney
14 and whether a reasonable attorney would investigate further. Wiggins
15 v. Smith, 539 U.S. 510, 527 (2003). A court must apply a “heavy
16 measure” of deference to counsel’s judgments during the
17 investigation. Strickland, 466 U.S. at 690-91. To find ineffective
18 assistance of counsel based on the failure to investigate, petitioner
19 must generally show that his conviction would have been nearly
20 impossible based on the evidence the investigation would have
21 produced. Reyes-Vejerano v. United States, 117 F. Supp.2d 103, 107
22 (D.P.R. 2000) (citing Passos-Paternina v. United States, 12 F.
23 Supp.2d 231, 236 n.4 (D.P.R. 1998)). He must “allege with specificity
24 what the investigation would have revealed and how it would have
25 altered the outcome of the trial.” United States v. Green, 882 F.2d
26 999, 1003 (5th Cir. 1989).

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1 Counsel may select from among non-frivolous claims to increase
2 the likelihood of success on appeal. Smith v. Robbins, 528 U.S. 259,
3 288 (2000). However, counsel is under no obligation to raise
4 meritless claims and the failure to do so does not imply ineffective
5 assistance of counsel. Acha v. United States, 910 F.2d 28, 32 (1st
6 Cir. 1990) (citing McMann v. Richardson, 397 U.S. 759 (1970)).
7 Issues raised on appeal in a perfunctory manner, that are not
8 accompanied by developed argumentation, are deemed waived. United
9 States v. Rosario-Peralta, 199 F.3d 552, 563 n.4 (1st Cir. 1999)
10 (citing United States v. Bongiorno, 106 F.3d 1027, 1034 (1st Cir.
11 1997)).

12 To begin with, Petitioner contends that we should apply the
13 Cronic standard and presume prejudice. (Docket Nos. 1, 5.) However,
14 counsel's alleged failure is far from complete. See Cronic, 466 U.S.
15 at 659 & n.25; Bell, 535 U.S. at 696-97. Petitioner's attorney made
16 several motions and objections during the trial (Case No. 05-309,
17 Docket Nos. 125, 126), put on a duress defense, delivered a closing
18 statement, and directly examined Petitioner during trial, Rodríguez-
19 Durán, 507 F.3d at 756-58. See Theodore, 468 F.3d at 57; Millender,
20 376 F.3d at 524. Petitioner has failed to allege facts showing that
21 counsel was totally absent or was otherwise prevented from assisting
22 him during the proceedings. See Cronic, 466 U.S. at 659 & n.25.
23 Therefore, we do not presume prejudice. See Strickland, 466 U.S. at
24 687.

25 Petitioner asserts that his trial attorney was ineffective
26 because he failed to conduct pretrial and trial investigation,
27 interview the government's witnesses prior to trial, or file more

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1 than five motions. (Docket No. 1.) However, Petitioner fails to
2 further develop his arguments. See Rosario-Peralta, 199 F.3d at 563
3 n.4. He has not identified exculpatory evidence or potential defense
4 witnesses that counsel could have interviewed had he investigated the
5 case more thoroughly. See Green, 882 F.2d at 1003. Thus, these
6 assertions fail to satisfy the Strickland prejudice prong. See
7 Strickland, 466 U.S. at 694; Reyes-Vejerano, 117 F.Supp.2d at 107;
8 Green, 882 F.2d at 1003.

9 Also, Petitioner contends that counsel was ineffective because
10 he failed to file a motion to suppress the drugs seized and did not
11 bring on appeal the claims Petitioner now raises regarding the United
12 States' alleged lack of jurisdiction and the unconstitutionality of
13 46 U.S.C. § 70504(a). (Docket No. 1.) According to Petitioner, the
14 Coast Guard needed a warrant to search the hidden compartment that
15 contained the drugs and was not justified in expanding the scope of
16 the safety inspection. (Id.) However, a motion to suppress the drugs
17 seized would have been without merit. See Bravo, 489 F.3d at 8-9
18 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 267 (1990))
19 (noting that the Fourth Amendment's prohibition against unreasonable
20 searches and seizures "does not apply to activities of the United
21 States against aliens in international waters"). Likewise, claims
22 regarding the United States' lack of jurisdiction and the invalidity
23 of 46 U.S.C. § 70504(a) are without merit. See supra Part III.A-B.
24 He was consequently under no obligation to raise these meritless
25 claims. See Acha, 910 F.2d at 32 (citing McMann, 397 U.S. 759)).

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Because we dismiss all of Petitioner's claims, we likewise deny his request for a hearing. See Rodríguez Rodríguez, 929 F.2d at 749-50 (quoting Dziurgot, 897 F.2d at 1225); 28 U.S.C. § 2255(b).

IV.

Conclusion

For the foregoing reasons, we **DENY** Petitioner's § 2255 motion. Pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings, summary dismissal is in order because it plainly appears from the record that Petitioner is not entitled to § 2255 relief in this court.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 13th day of August, 2009.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge